defendant may thus be required to pay may be much more than what he actually caused. If the result is unjust, it seems that estoppel should not be allowed to create a remedy, at least if there is some other relief possible.[11] It is submitted that the true solution is to abandon the language of estoppel and to allow an action analogous to deceit.[12] The defendant by his silence, when it was his duty to speak, has caused the plaintiff to be misled to his injury. Even the jurisdictions that insist on applying the principle of *Derry* v. *Peek* [13] would have no difficulty with this, as the defendant, by hypothesis, is aware of all the facts. His intent in keeping silence is of no consequence.[14] This remedy insures a just assessment of damages in each case, and, if the analysis of the decisions has been correct, it merely enforces legal obligations already recognized.

THE RIGHT TO APPEAR ON THE BALLOT UNDER THE PARTY NAME. — The right of individuals or groups to make exclusive use of a party name, or hold a position in the party organization, was not recognized at common law.[1] But universal statutes in this country make the nomination by a party a condition precedent to the right to appear on the official ballot under the party name.[2] In determining this right the courts must necessarily decide who is in fact the regular nominee of the party.[3] The custom of the party in the absence of specific legislative provision is the only test of regularity.

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difficulty. A late New Hampshire case contains an excellent discussion of this. See Conway National Bank *v.* Pease, 82 Atl. 1068, 1074, 1076 (N. H.).

[11] Fall River National Bank *v.* Buffinton, 97 Mass. 498. See Ogilvie *v.* West Australian Mortgage and Agency Corporation, Limited, [1896] A. C. 257, 270. This is not the only instance in the law where the remedy by estoppel is arbitrary and unjust. See EWART, ESTOPPEL, 226 *et seq.*

[12] Two cases seem to have been decided on this theory. The form of the action does not appear, but only the damages were recovered rather than the total value of the *res* nominally concerned. Commercial National Bank *v.* Nacogdoches Compress and Warehouse Co., 133 Fed. 501. See *In re* Romford Canal Co., 24 Ch. D. 85, 92, 93. An interesting analogy to this is found in a recent case which enjoined ejectment until the owner of the land had reimbursed in full one who had expended money on the land under a parol license. The right in the licensee to recover the money expended rather than the value of the alterations to the licensor is the conspicuous feature of this case. Johnson *v.* Bartron, 137 N. W. 1092 (N. D.).

[13] L. R. 14 A. C. 337.

[14] Foster *v.* Charles, 7 Bing. 105.

[1] McKane *v.* Adams, 123 N. Y. 609, 25 N. E. 1057; Kearns *v.* Howley, 188 Pa. St. 116, 41 Atl. 273. If the election of party delegates or committees is regulated by statute, the courts will give effect to a valid election in a primary. Walling *v.* Lansdon, 15 Idaho, 282, 97 Pac. 396, 402.

[2] For a short history of the ballot laws, see Matter of Madden, 148 N. Y. 136, 139, 42 N. E. 534, 540.

The statutes vary greatly in detail in the different states, and tend to-day to become more complex. But in their outlines they are substantially similar, and it seems that the conflicting decisions are often due rather to a difference in principle than to the words of the statutes on which the courts are eager to distinguish opposing cases. It must always be remembered, however, that general principles are likely to be replaced in any particular case by a legislative provision.

[3] It has often been said that this is a political and not a judicial question. This sometimes means, apparently, that the courts will follow the decision of a party tribunal. Davis *v.* Hambrick, 22 Ky. L. Rep. 815, 818, 58 S. W. 778, 780; Potter *v.*

Accordingly the courts will favor the nominees of a local convention held under the regular call of the party committee, as against the nominees of an opposing convention.[4] But if the state convention decides in favor of the latter, its decision will be accepted to exclude those who without this subsequent decision would have been the regular nominees.[5] These rules, since they are based on a recognition of party custom, should apply also to the decision of the national party on two rival state tickets, a decision usually made conclusive by the custom of the state party, though the statute does not itself recognize the national organization.[6]

But under primary laws, recognition of party custom is not usually called for. The legislature in legal effect gives the right to go on the ballot under the party name not to those nominated by the party, but only to those nominated under certain rules prescribed by the state.[7] The interesting question which has arisen in several recent cases is whether a primary nominee may remain on the ballot under the name of a party whose national organization he is actively opposing.[8] If he were removed, the recognition of party custom would again be nec-

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Deuel, 149 Mich. 393, 396, 112 N. W. 1071, 1072. But this, as explained above, is not because of lack of jurisdiction. Sometimes it means that the legislature has not provided, or intended, an appeal from the decision of the officer certifying the names to the election commissioners, or from a special administrative board. State *ex rel.* Chapman *v.* Miller, 52 Oh. St. 166, 39 N. E. 24; State *ex rel.* Cook *v.* Houser, 122 Wis. 534, 100 N. W. 964. But this does not make the question less a judicial one. Many courts, anxious to avoid a decision, have allowed two sets of contesting nominees to appear under the party name. People *ex rel.* Eaton *v.* District Court, 18 Colo. 26, 31 Pac. 339; State *ex rel.* Sturdevant *v.* Allen, 43 Neb. 651, 62 N. W. 35; Stephenson *v.* Boards of Election Commissioners, 118 Mich. 396, 76 N. W. 914; State *ex rel.* Gillis *v.* Johnson, 18 Mont. 556, 46 Pac. 440. But decisions directing both to be placed on the ballot where only one appeared before show clearly that there is jurisdiction to take action. Sims *v.* Daniels, 57 Kan. 552, 46 Pac. 952; Shields *v.* Jacob, 88 Mich. 164, 50 N. W. 105. The doctrine is discredited or modified by statute or decision even in the states where it originated. State *ex rel.* Rose *v.* Piper, 50 Neb. 42, 69 N. W. 384; McDonald *v.* Hinton, 114 Cal. 484, 46 Pac. 870; Spencer *v.* Maloney, 28 Colo. 38, 62 Pac. 850.

[4] State *ex rel.* Wolfe *v.* Falley, 9 N. D. 450, 83 N. W. 860; Williams *v.* Lewis, 6 Idaho 184, 54 Pac. 619; State *ex rel.* Howells *v.* Metcalf, 18 S. D. 393, 100 N. W. 923; Marcum *v.* Ballot Commissioners, 42 W. Va. 263, 26 S. E. 281; Hutchinson *v.* Brown, 122 Cal. 189, 54 Pac. 738; *In re* Nomination of Huey, 19 Pa. Co. Ct. Rep. 138.

[5] State *ex rel.* Buttz *v.* Liudahl, 11 N. D. 320, 91 N. W. 950; Matter of Fairchild, 151 N. Y. 359, 45 N. E. 943; *In re* Pollard, 25 N. Y. Supp. 385; Cain *v.* Page, 19 Ky. L. Rep. 977, 42 S. W. 336; Boggess *v.* Buxton, 67 W. Va. 679, 69 S. E. 367. *Cf.* State *ex rel.* O'Malley *v.* Lesueur, 103 Mo. 253, 15 S. W. 539. *Cf.* Twombly *v.* Smith, 25 Colo. 425, 55 Pac. 254; Republican Executive Committee *v.* Wetzel County Court, 68 W. Va. 113, 69 S. E. 522. But the power of the state organization over local officers is not everywhere wholly arbitrary. State *ex rel.* Yates *v.* Crittenden, 164 Mo. 237, 64 S. W. 162.

[6] See State *ex rel.* Nebraska Republican State Central Committee *v.* Wait, 138 N. W. 159 (Neb., 1912). The statute here specifically recognized the national party, and the nominees did not claim to represent a faction of that party. See State *ex rel.* Dahlman *v.* Piper, 50 Neb. 25, 69 N. W. 378. See especially State *ex rel.* Cook *v.* Houser, 122 Wis. 534, 100 N. W. 964, where the state organization prevailed because it was made by statute the judge of regularity.

[7] Stewart *v.* Polley, 137 N. W. 565 (S. D., 1912).

[8] This situation may arise when the state party and its electors refuse to indorse a presidential nominee, or when there is a split in a state party organization after a nomination is made. But the same question would be involved if a candidate for governor announced that he would carry out only the policies of the party opposing him, and appoint only its members to office.

essary in determining what committee could fill the vacancy, and the decision of the national organization on rival state committees should then be recognized by the courts.[9]

Is there, then, any principle by which nominees may be removed from the ballot? Even under the convention laws it is held that a party organization cannot revoke for any cause a nomination it has regularly made.[10] The nominee has a vested right. He has a status similar in many respects to that of a public officer.[11] Thus in a recent case nominees of the Republican party for presidential electors accepted places on the ballot as nominees of the Progressive party. The court held that their first position thereby became vacant, applying the common-law principle that the acceptance of a public office with inconsistent duties vacates one already held. *State ex rel. Nebraska Republican State Central Committee* v. *Wait*, 138 N. W. 159 (Neb.). This decision seems correct. But except in the case of nominees for presidential electors the duty to represent one party between nomination and election[12] is not necessarily inconsistent with the support of another. And even if non-performance of duty were a ground for subsequent removal, it would be very difficult in most cases to determine whether there had been non-performance of so vague and uncertain a duty.

But the whole purpose of conferring the right to use the party name on the ballot is to enable voters, without personal knowledge of the individual nominee, to vote for men supporting the party principles. If the representation on the ballot is deceptive, the law is more than nullified. There is certainly no injustice to the nominee in depriving him of his right when he is making an unconscionable use of it to defraud the voters. But it is argued that the courts alone cannot accomplish this result,[13] because the statute has said that the primary nominee shall go on the ballot. This, however, seems to do no more than create for him a vested right or status. The fact that this right is purely statutory should

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[9] See State *ex rel.* Nebraska Republican State Central Committee *v.* Wait, *supra*.

[10] Sterling *v.* Bones, 87 Md. 141, 39 Atl. 424; People *ex rel.* Simpson *v.* Board of Police Commissioners, 10 N. Y. Misc. 98, 31 N. Y. Supp. 112; Le Bert *v.* Shirley, 24 Colo. 269, 50 Pac. 862. The last two cases are perhaps explainable on the ground that the convention has no authority from the party to rescind a nomination. But while the convention is still in session it may rescind. Phillips *v.* Gallagher, 73 Minn. 528, 76 N. W. 285; Phillips *v.* Smith, 25 Colo. 398, 55 Pac. 177; *In re* Nash, 36 N. Y. Misc. 113, 72 N. Y. Supp. 1057.

[11] State *ex rel.* Rinder *v.* Goff, 129 Wis. 668, 109 N. W. 628. See State *ex rel.* O'Malley *v.* Lesueur, 103 Mo. 253, 264, 15 S. W. 539, 542. But see Attorney General *v.* Drohan, 169 Mass. 534. An office need have no duration, or emoluments. See State *ex rel.* Clark *v.* Stanley, 66 N. C. 59, 63. The death of a nominee creates a "vacancy." NEB., COMP. STAT., 1911, c. 26, § 118 *a*.

[12] By regulating the election and creating this quasi office the state at most only makes legal the moral duty to stand for the party ticket and principles during the campaign. Any duty after the election must be purely a moral one to the party.

[13] State *ex rel.* Kennedy *v.* Martin, 24 Mont. 403, 62 Pac. 588; Sbarboro *v.* Jordan, 44 Cal. Dec. 489 (1912). The California statute specifically recognizes the state organization as the party. It may be said that under such circumstances the voters would only be justified in considering the nominees as the candidates of the state organization. Even nominees for presidential electors are nominees of the state party, and a legislature *could* deprive the national party of all power over them. But it is a fact that voters consider that they represent the national party, and are deceived if they do not. But see Breidenthal *v.* Edwards, 57 Kan. 332, 46 Pac. 469.

not prevent the application to it, after its creation, of common-law principles of justice, in situations for which the legislature could not, or did not, provide.[14] The only means to prevent the statute's becoming an instrument for the defrauding of voters is to declare vacant the position of a nominee who makes such a use of it.[15] Furthermore, the statute itself recognizes certain causes creating vacancies, and their enumeration is not necessarily exclusive.[16] The same enumeration in regard to public officers does not annul the common-law ground for removal when an office with inconsistent duties is accepted.[17] The right or status of a nominee is of a new and peculiar character which calls for the application of a new means of attaining justice.[18] It seems, therefore, that the appearance of a man's name under the name of a party which he is actively opposing is such a fraud on the voters as to justify a court in declaring vacant his position on the ballot.

EMPLOYEES WITHIN THE SCOPE OF THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908. — The federal Employers' Liability Act of 1906 was held unconstitutional because interstate commerce was not sufficiently benefited by imposing an extraordinary liability upon an interstate railroad in favor of employees whose work might in no way concern such commerce.[1] It is submitted that an employers' liability act protecting all workmen whose efficiency might substantially affect interstate commerce would be valid in view of recent decisions that the Safety Appliance Act[2] can constitutionally include all cars of a train in which there is an interstate car,[3] or even a train purely intra-

[14] See State *ex rel.* Gray *v.* Olsen, 137 N. W. 561, 564 (S. D., 1912), where the majority denied relief on the ground that the party offered no nominees to take the place of those sought to be ousted.

[15] Party custom is here immaterial except as to who may fill the vacancy. The inquiry is solely whether voters are deceived. The principle would not extend to a nomination obtained by fraud, for the nominee might still represent the party principles. It might seem desirable, however, to allow the party to avoid such a nomination. Fraud in obtaining signatures to secure a place on the primary ballot is immaterial after the nomination is made. Marks *v.* Davis, 125 Pac. 344 (Kan., 1912). But it would seem that such signatures might be withdrawn before the nomination.

[16] But see State *ex rel.* Vance *v.* Wilson, 30 Kan. 661, 2 Pac. 828.

[17] Attorney General *ex rel.* Moreland *v.* Common Council, 112 Mich. 145, 70 N. W. 450; MICH., COMP. LAWS, 1897, 2993, 3001 *et seq.* *Cf.* State *ex rel.* Crawford *v.* Anderson, 136 N. W. 128 (Ia., 1912). Insanity may be a ground for removal though not specially provided for. Long *v.* Bowen, 15 Ky. L. Rep. 276, 23 S. W. 343.

[18] It is usually held that a party name cannot be chosen so similar to that of an existing party as to deceive the voters. Phillips *v.* Curley, 28 Colo. 34, 62 Pac. 837. Only an extension of this principle is called for. See also *In re* Folks, 134 N. Y. App. Div. 376, 119 N. Y. Supp. 71.

[1] Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141. See 25 HARV. L. REV. 548.

[2] Act of March 2, 1893, U. S. COMP. STAT., 1901, p. 3174, as amended March 2, 1903, U. S. COMP. STAT., SUPP. 1909, p. 1143. In terms this statute applies to all cars used on any railroad engaged in interstate commerce and gives every employee a right of action. This seems as broad as the first Employers' Liability Act, but the construction of the court saves it. Southern Ry. Co. *v.* United States, 222 U. S. 20, 32 Sup. Ct. 2.

[3] Norfolk & Western Ry. Co. *v.* United States, 177 Fed. 623; United States *v.* International & G. N. R. Co., 174 Fed. 638.